

September 23. 1768.

A N S W E R S

F O R

CHARLES SINCLAIR of *Olrick*;

T O

The PETITION of HENRIETTA SINCLAIR, Daughter and Executrix of the deceased DONALD SINCLAIR of *Olrick*, and BENJAMIN MOODIE of *Melfetter* her Husband, for his Interest.

THE question moved in the petition now to be answered, is merely a question in law, and is noways involved in fact: and notwithstanding the ingenuity and learned arguments used for the petitioner, the respondent can, with submission, have no doubt of satisfying the Court, that the decision in this point is as clearly fixed and established upon the principles of the laws of Scotland as any case can possibly be, and which, without running into mazes of argument, appears to a demonstration, simply by attending to the nature and source of legitim, and the right that children have thereby in the estate and effects of their father.

Your Lordships see, that the facts which give rise to this question shortly are, That Donald Sinclair of *Olrick*, a gentleman of an ancient family, though but small estate, had two children, the petitioner Mrs Moodie, and the respondent. In her contract of marriage, she was provided with L. 500 Sterling, which was a very good tocher out of such an estate: and from every circumstance attending the affair, with the recital of which the respondent will not now trouble your Lordships, it is obvious, that the meaning of parties and writer was, that this tocher was to be in full of all that she could ever claim from her father, or out of his estate or effects after his death, however she and her husband only explicitly discharged her legitim, or portion natural.

The respondent having been an officer in the Dutch service when young, and being necessarily led to contract debts to a considerable
A amount,

ambunt, these were all paid by old Olrick, who took conveyances to the most of them in the name of a trustee, no doubt to be by way of an awe-band upon the respondent; though, from the use which the petitioner would now convert them to, through the claims reared in the present process, they would serve to distress, if not rout out a family for which the old gentleman had the greatest regard; and the greatest inclination to preserve.

For your Lordships will observe, that the great struggle which the petitioner makes in this question, is solely with the view, that in her right of executrix she may include all the moveable effects of the father, and thus be intitled to make a demand against the respondent for the whole of those debts, which no person living can ever suppose was the intention of the father, that these debts should ever be converted to the purpose of ruining the heir of his family.

The interlocutor of the court reclaimed against, in substance finds, that the discharge of Mrs Moodie and her husband does not exclude her from her father's executry; but that the respondent has right to the legitim, which was by her expressly discharged: by which judgment, taking it as it stands, she will have right to one half of the free moveables of the late Olrick; though, upon her marriage, she had received, in name of portion, all that was ever intended for her.

The whole argument in the petition, evidently proceeds upon a wrong position and fundamental error in point of law; for it is always assumed as a principle, that the legitim belongs to the younger children alone *proprio jure*, and that the eldest son has no title thereto, *unless he collate*.

But here the petitioners endeavour to confound two things that are in themselves quite distinct and separate, the nature of the right of legitim, and the mode of division among the whole children, which may operate differently according to certain circumstances. For it is no doubt true, that where there is a real estate, an eldest son, and younger children unforisfiliate, that he has no title to demand any part of the legitim and executry, unless he collate the real estate with them, and content himself with an equal share of the whole.

But this very exception shows the radical right of the heir in this part of his father's effects as much as the other children: for where there is no real estate, the eldest son draws his share of the legitim in common form along with the other children; but in case
the

the father died possessed of real subjects, the law hath given an option to the eldest son, either to betake himself to these as his share of his father's effects, or a rateable share and equal portion through the whole with the younger children: yet this is no more than a particular indulgence of the law to the eldest son; but is the very reverse of the doctrine which maintains, that the eldest son has not as much a right to the legitim as the younger children; for the exception in the case of heritage without collation, is not an exception to the law or the right, but it is properly the mode of division introduced by the law among the children in certain circumstances, giving an option to the heir if he shall chuse to use it; and through not attending to this obvious distinction, some mistakes seem to have happened among our lawyers, and some positions laid down indisputably repugnant to the most certain principles.

For if we consider the source of the legitim, or the law from whence it was derived, and certain points that have been established thereanent by the decisions of the Court, and agreed to by all lawyers; it is, with submission, impossible to alter the present interlocutor, without overturning the whole system of the law upon this matter.

By the Civil Law, the legitim due to children out of their father's estate, was originally the fourth of the whole lands and moveables of which the father died possessed; nor could he by any *mortis causa* deed deprive them thereof. This was somewhat varied after the time of *Justinian*, whereby it was appointed, that if there were four children or fewer, they should draw a third, and if five or more, one half; and if the father pretended to dispose of his subjects, not leaving his children this *legitimam portionem*, it was competent to the children to quarrel and set aside the testament, by an action called the *querela inofficiosa*; and if they would not all concur in this action, the right of the whole did accresce to one or more of them that should prosecute.

Nov. 18.
Cap. 1.

L. 23. §. 2.
ff. de in off.
test.

Here there was no distinction between one or other of the children; but their right and title was all upon the same footing; and the same doctrine anent the legitim, wife's share, and dead's part, were very early introduced into the law of Scotland, under certain limitations consistent with feudal principles: For the following points seem to be clearly fixed by decisions, and generally understood as the law of this country:

Reg. maj.
L. 2. cap. 37.

1st, That the legitim belongs to the whole children in *familia proprio*

prio jure, and that the father can by no deed of his deprive them thereof: They are in the character of creditors to their father, and those who survive him have a right to the legitim upon their inherent title of children.

2dly, This right of legitim does not transmit to the heirs of any of the children who happen to die before their father, but accretes to the survivors; neither does the discharge of the right of legitim granted by any of them to the father enlarge his dead's part; but this in like manner accretes to the other children who have not renounced.

3dly, That where there is no heritable subjects, the eldest son and the other children are entitled to the legitim, without any distinction or difference among them in the division. And, in like manner, though there should be heritage, it is optional to the eldest son either to betake himself to that heritage by way of his share of his father's subjects, or to have a general division through the whole, which is called *collation* with the younger children.

4thly, That an only son and universal heir has a right to the legitim, and from which his father has no more power to exclude him than he has to exclude the younger children, or any one of them: and, in like manner, in the division of moveables between an only son and the relict, he draws the legitim in the same manner that younger children would have done, without any collation of heritage.

But if the doctrine maintained in the petition shall now be considered to be law, the respondent, with submission, apprehends that the whole of the above principles and propositions fall to be reversed, because it is impossible to support the one in consistency with the other; and if the eldest son is not entitled to take the legitim upon the discharge of the only younger child, he cannot then be considered as having any sort of natural right to the legitim, or even any power of collation, or that any such thing as a right of legitim did exist after the discharge of the younger child.

What then is the effect of such discharge? The respondent apprehends, that in reason and common sense it must produce the same consequence as if the renouncer was a stranger or naturally dead: For as the right of legitim was undoubtedly sopped and extinguished in the person of Mrs Moodie to every intent and purpose whatever as much as what death could do, she must support her plea by maintaining, that an eldest son who succeeds to an estate from
his

his father has no sort of right to legitim, nor no title in any case whatever to demand it.

Supposing old Olrick to have named a person his executor and universal legator, being neither of his two children, Mrs Moodie will not pretend that she in that case could have put in any claim for the legitim, which she had expressly renounced: For she does it here under the character of executrix, upon the medium that the legitim is included in the executry. Could not the respondent then have claimed his right of legitim from that legator? For if Mrs Moodie can now say that her title of executrix includes the legitim which she had formerly renounced, the legator was entitled to maintain the very same plea.

Supposing further, Olrick to have had a wife at the time of his death, and a competition to have ensued between her and her daughter Mrs Moodie, with respect to their different claims, how would the division of Olrick's effects have fallen to have been made between them?—In common cases, where a man leaves a wife and a child or children, the effects admit of a tripartite division; one third as the *jus relictæ*, another third as the legitim, and the last third as the dead's part or executry: but in the case of no wife existing, or a wife and no children, the division becomes bipartite, one half to the legitim or to the widow, the other half to the executry.

How then would your Lordships have divided Olrick's effects between his wife and daughter? It is apprehended the division must have been bipartite, one half to Mrs Moodie as executor, and the other half to her mother: For Mrs Moodie could make no claim as a child in this case, nor presume to assume a right in this competition which she had explicitly renounced. On the other hand, supposing the competition with the widow to have ensued with Olrick as the only child, it does not seem to admit of a question, that he could have exercised every legal claim competent both to a child and an executor, and thus, in virtue of the two different titles vested in his person, have established his right to two thirds of his father's moveables. This seems, with submission, a very apt illustration of the question in hand, and shews that this case depends entirely on certain principles.

This is the rule clearly established by the Statute 1669. cap. 19. with respect to the wife's third of moveables, whereby the commissaries are enjoined to admit of no division in the confirmation of testaments upon account of the relict, where, by contract of marriage or

otherwise, she is excluded from all share of her husband's moveables; that is, in other words, where she has renounced her third, by accepting a special provision in satisfaction thereof. The wife's third and the children's legitim stand precisely upon the same footing; both are parts of that division which the law makes of the goods in communion, one third to the widow, another third to the children *in familia* existing at the father's death, and the remaining third for the dead's part. Now, if so be that the relict's renunciation of her third has not the effect to enlarge the dead's part beyond its just proportion, but accretes equally to the legitim and dead's part, in the same manner as it would have done if there had been no widow, it will be matter of difficulty to assign any good reason why it should not operate equally where no children exist, or where they have renounced or discharged their legitim. That their renunciation must encrease the relict's share is clear, as in that case the testament can only receive a bipartite division; and that the wife's renunciation has the same effect is equally clear, the nonexistence of wife and children, or their having renounced and discharged their legal shares, being to all intents and purposes the same. If all the children and wife renounce and discharge, the consequence is undeniable, that the executry will be thereby benefited, as the dead's part will then comprehend the whole; but where there is either wife or children *in familia*, the division must be bipartite or tripartite, according to the state of the family at that time: and as it has been already proved, that the eldest son is *de jure* entitled to a share of the legitim, either where there is no heritage, or upon his collating the same, and is only excluded therefrom in favours of the other children *in familia*: unless he collate it, it is a necessary consequence, that where there are no other children *in familia*, he takes the whole legitim as in his own right.

Upon this principle do the opinions of lawyers and the judgments of this Court rest, *viz.* That an only son and heir is entitled to the legitim in a question with the relict, so as to make a tripartite division of the goods in communion. That the respondent would be entitled to claim the legitim in competition with the relict is undeniable; that the petitioner, after having discharged her right of legitim, would not be entitled to maintain any such claim with the relict, is equally certain; upon what principle then of law or justice can it be argued, that this claim should revive in a question with him, which was so absolutely renounced in favours of all others

others interested in the division? The principle of *vinco vincentem* strongly applies; for, as the widow must have excluded the petitioner from claiming a legitim, and as, notwithstanding thereof, the respondent must have drawn the legitim in a question with the relict, how absurd must it appear that the petitioner should be preferable to the respondent in that very legitim, or that the legitim should be so pite in competition with the petitioner, as in right of the dead's part, when it must have stood in full force, had the question been with the widow claiming her legal share of the goods in communion?

With respect to the precedents confirming the principles that have been before laid down for the respondent, they are various; some of them have before been mentioned in the previous steps in this process, and are taken notice of in the petition; and which, with others to the same purpose, fall here to be set forth to the Court.

The first decision which the respondent can observe, that applies to this point, is as far back as 1561, *Hamilton against Wallace*, collected in the Dictionary, *Tit. Legitim*, in the following words: "If children be forisfamiliat, they can have no bairn's part of gear, but a bipartite division must be made betwixt the relict and the dead's part."—These children were the executors of their father; and if the plea maintained for the petitioners was good, by becoming executors their right to the legitim would also have revived, and so the division between them and the relict ought to have been tripartite. This decision doth evidently apply.

The decision collected by *Fountainhall*, 4th December 1694, *Fowbester*, is as much in point to the present question as one case can possibly be to another. "A daughter, in her contract of marriage, accepting of a tocher, and granting a renunciation of all she could ask or crave through her father's decease, and her brother the only other child seeking to be confirmed executor after the father's decease: Objected for the sister, That he cannot both be heir and executor; that the office is hers, and a renunciation cannot bar her, unless there were other younger children, but must fall back to herself as part of her father's moveables. The Lords found she ought to be reputed as out of the field, and the sole office and benefit accresced to the brother."

There is a decision to the same purpose, taken notice of by Lord Stair, January 27, 1680. *Sandilands*, "where a defunct had only
" two

Fol. 530.
new edit.

“ two daughters besides his heir. The one, in her contract of marriage, getting a tocher in full satisfaction of her *portion natural* and *bairns part*; and the other, in her contract, being provided to be a *bairn in the house*, was found to have the *whole right* to the *bairns part*, and to the *dead's part*, and *office of executry*, excluding the other, who was found to succeed to no part.”

The same noble author, on the very next page, mentions a decision recited in the petition, which applies to one branch of the doctrine maintained for the respondent, in these words: “ *2dly*, It was found, if there be but one child in *familia*, and so both heir and executor, *That child bath not only the heritage, but the whole bairns part*; and so abates the *relict's part* and *dead's part*, without collation of the heritage. January 12. 1681. Trotter.”

Upon the same principles, there is a decision taken notice of in the Dictionary, folio 545, June 1728, *Henderson against Henderson*, where one of more daughters having renounced her right of legitim in favours of her father, he again granted a disposition of all his effects in favours of his son. In a question with another daughter, upon her claim of legitim, “ The Lords found that the eldest daughter being forisfiliate before the father's decease, the brother could claim no interest nor share in the legitim upon her account.” This also proves, that no part of the legitim accretes to the father through the renunciation of any of the children, nor is any *facultas testandi* conferred thereby upon him; but that the legitim accretes to the children in *familia*, so long as there is one that hath not renounced this right.

The decision in the case of *Mr Justice*, 10th November 1737, is also very strong upon this point, as it was there found, although he was the only child, and universal heir of his father, yet he was entitled to demand his legitim against the disponent or legator of the father.

The decision in the case of *Campbells*, 21st July 1738, still proceeds upon the same principles, and explicitly establishes this doctrine, “ That a renunciation by a child of his claim of legitim had the same effect at his death in favour of the other children entitled thereto, and that the share of the renouncer divides among the rest.” If Mrs Moodie could maintain, in opposition to the whole train of decisions from the earliest periods, that the eldest son and heir was in no case entitled to take up the legitim, even in the event of no more children existing, no doubt her present plea might be tenible; but,

but as, from principles and precedents, it is clear that the eldest son has as much a claim to the legitim as any other of the children, the renunciation, therefore, of an only younger child, or the whole younger children, must operate the same effect towards him, as the renunciation of any one of the younger children would towards the rest.

There is another decision collected by Falconer, 25th Feb. 1747, *Marshall against Finlays*, where, in a question between a husband and the executors of the second wife, the husband having two sons of a former marriage, the youngest of whom was forisfiliate the dispute there was, how the goods in communion should be divided? The husband contended that the division should be tripartite, and that a third should be set aside for his eldest son and heir, in virtue of his right of legitim: The executors of the wife contended, as is now done for Mrs Moodie, that the division ought to be bipartite, that the heir could claim no legitim or bairns-part, and as the youngest had got satisfaction and renounced, this benefit ought not to accrue to the heir, but to the father. Your Lordships, in that case, ordered the division to be *tripartite*, which was directly as in the present case, giving the heir the whole right of legitim, which had been renounced or discharged by his younger brother, then alive.

In opposition to all these, the only decision cited for the petitioners, which doth anywise apply, is that 22d February 1749, *Martin against Agnew*; which, the respondent will fairly own, does appear pretty similar; but he must beg leave to speak from the authority of one of your Lordships, when this question was last before the court, and who appears to have been one of the learned counsel for the person that succeeded in that question, "That the judges were very much divided in giving this decision, and that it appeared directly contrary to the whole train of decisions of the court, for about 200 years before, and to the incontrovertable principles upon which children's right of legitim is founded."

It will be observed by your Lordships, that the whole precedents upon this doctrine of legitim, above referred to by the respondent, proceeded upon various branches of this law in the questions that occurred before the court, which all tend to establish this general principle, That the eldest son and heir, where there is no younger children, or where these younger children renounce and discharge their right of legitim; that this right accretes to him in the same way

as if they were naturally dead, or as it would do to any younger child upon the renunciation of the rest, and that he uses and exercees this right in the same way as any younger child would do.

The decision indeed, *Martin* against *Agnew*, seems to overturn every branch of the law that had been established by former authorities. But it is only a single decision; and it is apprehended, if it shall appear to your Lordships to be contrary to principles, you will not be much moved thereby; *nam principiis, non exemplis, judicare oportet*; or, according to the rule laid down in the Civil Law, *Quod contra rationem juris receptum est, non est producendum ad consequentiam*.

With respect to the authorities of *Lord Bankton* and *Professor Erskine*, where it is laid down, That the renunciation of the only younger child has the effect to convert the whole subject into dead's part, and thus will fall to the renouncer, as executrix:—These positions are entirely founded upon the above decision, *Martin* against *Agnew*, and referred to by the learned authors, as their authority for maintaining this doctrine; so that if the decision is erroneous, the opinions of these lawyers founded thereon, cannot be regarded. So the respondent will only observe, That had *Lord Bankton* attended to certain other propositions laid down by him in the same title, his Lordship would surely have avoided a contradiction between one part of the law with the other, upon the very same point and principles; for he lays it expressly down, That the forisfamiliarisation of a child bars him from the legitim. And at the foot of page 380, he expressly says, “ If any of the children were forisfamiliated, the whole legitim belongs to the rest; and, if all the younger children have renounced their interest in the executry, it will only accrue to the heir, in the same manner as in a question with the wife or her next of kin, when he is the only child.”

In short, it is obvious from the Civil Law, from which the right of legitim was derived and introduced into our law; from all our lawyers, and from a series of decisions for now upwards of 200 years, excepting the single decision in the 1749 above-mentioned, That all the children *in familia*, who survived their father, had an equal title to draw a rateable proportion of the legitim; and that the eldest son and heir when he was an only child, or the younger children dying before their father, or *renouncing* their right of legitim, (which has ever been considered to produce the same effect in law as their death), that the eldest son then drew the whole. But as in the Civil Law,

Law, this legitim was a certain portion of the father's effects heritable and moveable, in the introduction of this practice into our law, it behoved to be in some measure governed by our feudal principles; so that with us it is only extended to a certain share of the moveables. But still the regulation was the same as among the Romans, the legitim was due to the whole children *in familia*; and, in case of no heritage, the division was rateable among the whole children, without any distinction between the elder or the younger; but in case there was a real estate, to which the eldest son had a right to succeed as heir, the law does not, on that account, exclude him from his right of legitim: But, in order that some degree of equality may be preserved among all the children of a family, in the distribution of the common parent's effects, it is provided, that the eldest son, if he take any share of this legitim along with the other children, must collate the heritage with them; but, if these younger children have received a proper consideration from their father for the right of legitim, and have renounced or discharged the same, they can have no further interest in the matter. Their right accretes to the eldest, whose title is as natural and inherent as theirs.

In respect whereof, &c.

D. ARMSTRONG.

123 April 20 1914

D. ANNISTON, G.

